

Presentation to the Shoreland Protection Act Commission

Brad Kuster
Conservation Law Foundation
October 20, 2005

Purposes of the Shoreland Protection Act

483-B:1 Purpose. - The general court finds that:

I. The shorelands of the state are among its most valuable and fragile natural resources and their protection is essential to maintain the integrity of public waters.

I-a. A natural woodland buffer, consisting of trees and other vegetation located in areas adjoining public waters, functions to intercept surface runoff, wastewater, subsurface flow, and deeper groundwater flows from upland sources and to remove or minimize the effects of nutrients, sediment, organic matter, pesticides, and other pollutants and to moderate the temperature of near-shore waters.

II. The public waters of New Hampshire are valuable resources held in trust by the state. The state has an interest in protecting those waters and has the jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit.

III. There is great concern throughout the state relating to the utilization, protection, restoration and preservation of shorelands because of their effect on state waters.

IV. Under current law the potential exists for uncoordinated, unplanned and piecemeal development along the state's shorelines, which could result in significant negative impacts on the public waters of New Hampshire.

Source: 1991, 303:1.

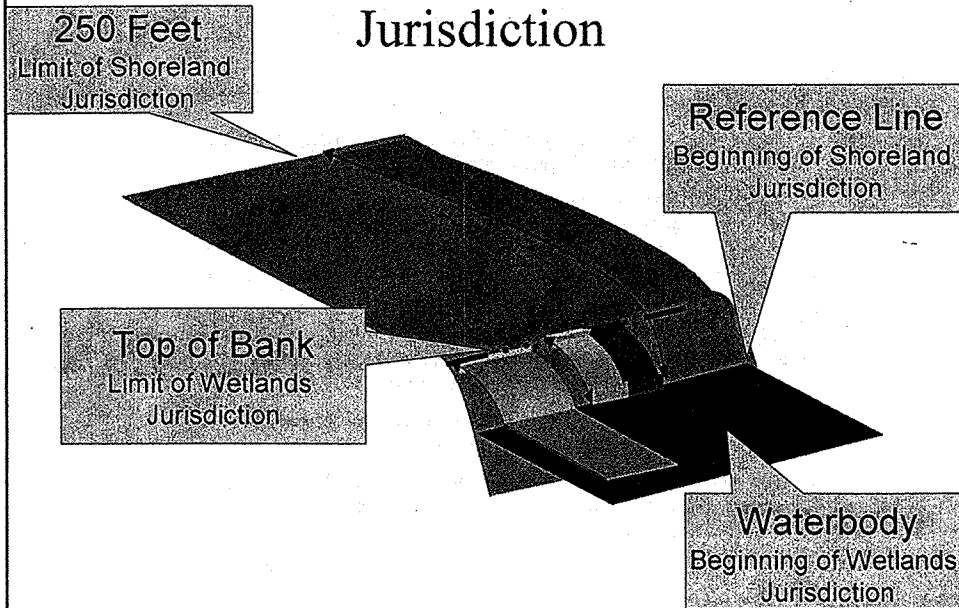
Consistency Requirement

483-B.3 Consistency Required:

I. All state agencies shall perform their responsibilities in a manner consistent with the intent of this chapter. State and local permits for work within the protected shorelands shall be issued only when consistent with the policies of this chapter.

II. When the standards and practices established in this chapter conflict with other local or state laws and rules, the more stringent standard shall control.

Shoreland Protection and Wetlands Jurisdiction





DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095

603-271-3503 FAX 603-271-2867

TDD Access: Relay NH 1-800-735-2964



April 20, 1992

The Hon. Wayne M. King, Chairman
Senate Environment Committee
Room 209
Legislative Office Building
Concord, NH 03301

RE: House Bill 1400: Shoreland Protection Act

Dear Senator King:

As the Department of Environmental Services was unable to testify at the April 1, 1992 Senate Environment Committee Hearing, we would like to convey to you in writing some of the Department's concerns and suggestions regarding the bill.

1. Please find attached the amendment to the bill prepared by the Department, dated April 1, 1992. You received a copy of this amendment on April 2, however, we would like to formally transmit the amendment to you at this time. The purpose of the amendment was to streamline the shoreland permit process, reduce costs and build upon existing programs.

In addition, it is our understanding that the Department of Resources and Economic Development (DRED) is not comfortable with enforcing the natural woodland buffer as written in RSA 483-B:9(V)(a). While DRED is presently responsible for the enforcement of timber harvesting activities, DRED has indicated that if no forest management practices are being carried out on a parcel within the shoreland zone, then they do not want to become the enforcement agency under the Shoreland Protection Act.

Since neither DRED nor DES is comfortable with the responsibility of enforcement of the natural woodland buffer as currently proposed, one option may be to alter the natural woodland buffer width to 25', with exceptions for (1) pathways and (2) the removal of dead, diseased, unsafe, noxious or fallen trees, saplings, shrubs, or groundcovers.

2. The Department is supportive of the amendment proposed by the NH Association of Conservation Districts, with further changes as made by the Department. Please see the attached amendment for those changes.

AIR RESOURCES DIV.
64 No. Main Street
Caller Box 2033
Concord, N.H. 03302-2033
Tel. 603-271-1370
Fax 603-271-1381

WASTE MANAGEMENT DIV.
6 Hazen Drive
Concord, N.H. 03301
Tel. 603-271-2900
Fax 603-271-2456

WATER RESOURCES DIV.
64 No. Main Street
P.O. Box 2008
Concord, N.H. 03302-2008
Tel. 603-271-3406
Fax 603-271-1381

WATER SUPPLY & POLLUTION CONTROL DIV.
P.O. Box 95
Concord, N.H. 03302-0095
Tel. 603-271-3503
Fax 603-271-2181

Squam Lake

Full Lake Elev = 562.50 -

EXCAVATION ALONG BANK

(within jurisdiction)

Area = 156'sq

Volume = 23cuyd

PROPOSED DREDGE IN LAKE

(see Cross Section A-A sheet 2)

Dredge Area = 600 Sq.Ft.

Dredge Volume = 45.0 Cu.Yds.

Siltation

Barrier To Be Installed

During Construction

(per ENV-Wt 304.06)

Proposed Seasonal Dock

6 Wide x 40' Long Wooden Dock

Area = 240 Sq.Ft.

EXISTING DECK

RECONFIGURED/REDUCED

EXISTING SEASONAL
DOCK TO BE
REMOVED

PUMP
HOUSE
FF= REMOVED
564.64'

Limit of temporary
impacts during
construction

Area = 400 Sq.Ft

15' LONG RIP-RAP (TYP.)

TO MINIMIZE EROSION

SEE DETAILS, SHEET 2.

PARKING AREA

TREE TO BE REMOVED (TYP.)

EXISTING PARKING AREA
REDUCED TO PATH

BEACH HOUSE

FF=

564.59'

DECK

12

PATH

WP 18

WP 18

WP 23

WP 30

WP 30

WP 30

WP 30

WP 30

WP 30

WP 30

WP 30

WP 30

483-B:6 Prior Approval; Permits:

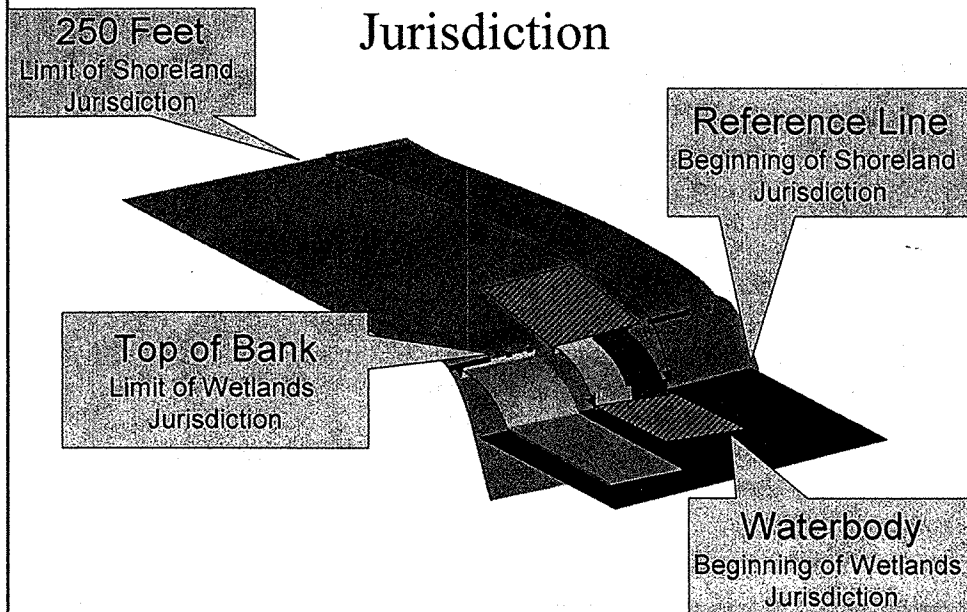
I. Within the protected shoreland, any person intending to:

- (a) Engage in any earth excavation activity shall obtain all necessary local approvals in compliance with RSA 155-E.
- (b) Construct a water-dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and all necessary permits pursuant to RSA 482-A.
- (c) Install a septic system as described in RSA 483-B:9, V(b)(1)-(3) shall obtain all permits pursuant to RSA 485-A:29.
- (d) Conduct an activity resulting in a contiguous disturbed area exceeding 50,000 square feet shall obtain a permit pursuant to RSA 485-A:17.
- (e) Subdivide land as described in RSA 483-B:9, V(d) and (e) shall obtain approval pursuant to RSA 485-A:29.

If, in applying for these approvals and permits, such persons shall demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of this chapter. The department shall grant, deny, or attach reasonable conditions to a permit listed in subparagraphs I(a)-(e), to protect the public waters or the public health, safety or welfare. Such conditions shall be related to the purposes of this chapter.

Source: 1991, 303:1; 1992, 235:10, eff. Jan. 1, 1993; 1996, 17:3, eff. June 14, 1996.

Shoreland Protection and Wetlands Jurisdiction



Boathouse Permit Appeals

- Legal Issue Became- Under RSA 483-B:6
 - Whether Wetlands Bureau must include the “upland” area in the permit review process

Specifically:

- Whether the Bureau must apply the *most stringent standards*
- To *all of the area* impacted

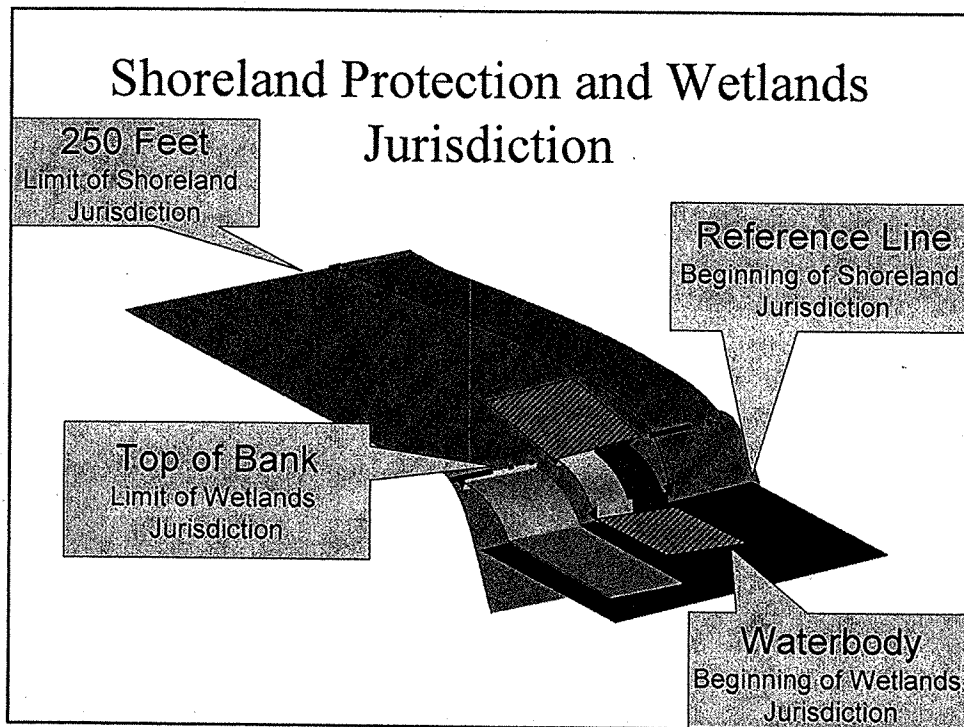
CLF's Position in Appeals

Two conclusions compelled by the intent and plain language of RSA 483-B:

1. Legislature chose – at request of Commissioner Varney:
 - To rely on existing permitting framework of 482-A
 - As best mechanism to ensure that standards of act met
2. Wetland Bureau's jurisdiction
 - When issuing these 482-A permits
 - For “water dependent structures”
 - Includes all area impacted within “protected shoreland”

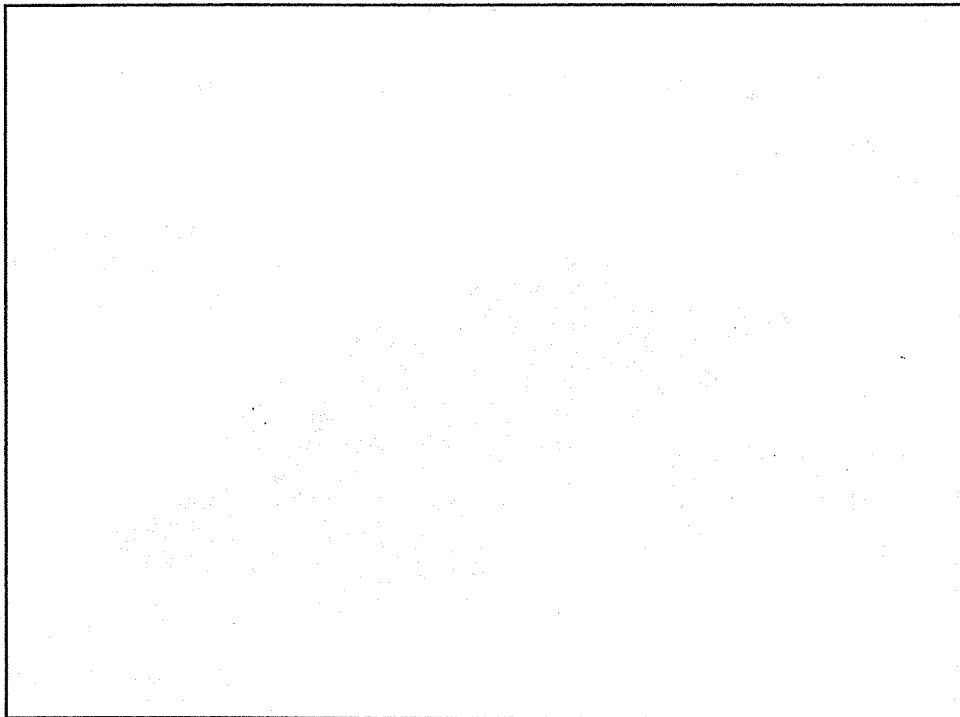
Superior Court's Ruling

- “Based on a plain reading of the statutory scheme, applying the policies behind the adoption of the CSPA and the interplay between RSA 483-B and RSA 482-A, the court finds that in the present cases, the Bureau’s jurisdiction extended to the entire area of the proposed projects, it did not end at the bank of the lake.”
- Wetlands Bureau is required to apply
 - The most stringent standards under the 482-A permit requirements
 - To the entire area of the dredging and excavation



Lessons from Boathouse Appeals

1. Limited to “water dependent structures”
2. 483-B:6 provides a “road map” for what projects in “protected shoreland” are subject to specific review and permitting
3. During permit review - the most stringent standards must be applied



THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Roy and Myra Gordon et. al
Marianna Cayten and C. Gene Cayten et al. (Carroll County)

v.

New Hampshire Department of Environmental Services Wetlands Council

No. 04-E-0218 (Belknap County)
No. 04-E-0083 (Carroll County)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Roy and Myra Gordon ("the Gordons") and Marianna and Gene Cayten ("the Caytens") own property on Squam Lake. The Gordons own property in Center Harbor (Belknap County) and the Caytens own property in Moultonborough (Carroll County). The Gordons and the Caytens separately appeal decisions of the Wetlands Council upholding the issuance of Dredge and Fill permits to Robert and Leslie Dahl ("the Dahls") of Center Harbor and The Cambi Squam Lake Realty Trust of Moultonborough ("the Cambis"). The cases were consolidated for the limited purpose of determining the common issues raised by the parties in their motions for summary judgment.

The Gordons and the Caytons and the intervenor Conservation Law Foundation (collectively "the Appellants") move for summary judgment on Counts I and II of their appeals before the Superior Court. The State of New Hampshire, Wetlands Council as appellee and the Dahls and Cambis as intervenors (collectively "the Appellees") object and filed cross motions for summary judgment on the same counts. A hearing on the motions was held on June 15, 2005. After considering the arguments and the record, the Appellants motion is GRANTED in part and DENIED in part. Likewise the Appellees' motions are GRANTED in part and DENIED in part.

boathouse. The proposed boathouse would be built from the shoreline and within the 75-foot setback upland from the shoreline. In addition to the 962 square foot dredge area, the Dahl's proposal required the excavation of 2,200 square feet on the upland side of the lake, which would become the "dug-in" portion of the boathouse. The Dahl's application included research by the New Hampshire Natural Heritage Inventory, asserting that there are no known protected or sensitive species of plant or animal in the area of the proposed dredge site. The Dahl's also submitted a photo-log of standing trees in the proposed area. The Loon Preservation Committee expressed concerns and made suggested conditions of use, which were incorporated by the applicants.

In February 2003 the Gordons filed an objection letter with the Bureau. In March 2003, the Bureau placed a hold on the Dahl's application pending resolution of a property dispute involving the Dahls and the Gordons. In August 2003, a decision was rendered on the property dispute in favor of the Dahls. The Bureau approved the Dahl's application in September of 2003, with numerous conditions, standards for approval, findings of fact and rulings in support of the decision See C.R. 115-118. Specific to the instant motions, condition 18 requires that all activity on the property be conducted in accordance with the Comprehensive Shoreline Protection Act. ("CSPA"). In the Findings of Fact, the Bureau stated that the permit will be issued only if the project complies with the CSPA. It goes on to note many other provisions of the CSPA in its findings, and specifically rules that the proposed boathouse is in keeping with the intent and purpose of the CSPA.

The Gordons filed for reconsideration, which was denied by the Bureau, articulated by findings of fact and rulings in support of the decision. The Governor and Council approved the permit in November 2003. The Gordons then appealed the decision to the Wetlands Council on the grounds that the Bureau acted unreasonably by waiving structure size restrictions and that the

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Bureau disregarded potential impacts of the project, specifically the spread of milfoil in the lake. They also raised the issue of non-compliance with the CSPA. The Wetlands Council, after a lengthy hearing on the merits, denied the appeal on September 1, 2004. The basis for the denial was that the appellant failed to meet its burden of proving that the Bureau acted unlawfully or unreasonably. The appellants moved for reconsideration, reiterating their arguments before the council. The motion to reconsider was denied and this appeal followed.

In addition, the Conservation Law Foundation ("CLF") attempted to intervene as a party in this case when it was before the Bureau for reconsideration. The Gordons are members of CLF. Their attempt to intervene was denied. CLF also sought to intervene as a party on appeal to the Wetland's Council. This attempt was also denied. However, an attorney for CLF was present at the hearing before the Council. The Gordons were given additional time for argument before the Wetland's Council, to allow CLF an opportunity to participate. CLF was not, however, made a party of record. During the appeal process, the Dahl's went forward with construction of the boathouse.

Carroll County Docket No. 04-E-0083

In August 2002, Joseph Cambi and Jennifer Paulson-Cambi applied for a "dredge and fill" permit from the Bureau. The application, as approved, was to build a "dug-in" boathouse on the shore of Squam Lake in Moultonborough. The initial application was denied because it infringed on wetland areas. The Cambis made the necessary changes to their application. As a result of the changes, the Cambis proposed to dredge 45 cubic yards of material from 600 square feet of the lakebed and shore and to excavate 1064 square feet along 23 linear feet of shoreline. The purpose of dredging was to create boat access to a 918 square foot boathouse. The application also included the installation of a 6 foot by 40 foot seasonal dock. After the application was

approved, the Caytens objected and filed for reconsideration before the Bureau, which was denied. They then filed an appeal with the Wetlands Council on the grounds that the Bureau failed to apply the CSPA in making its decision. Numerous residents of Squam Lake attempted to intervene in the case, as did CLF. All attempts to intervene were denied. The Wetlands Council denied the appeal and a motion for reconsideration. The Caytens then filed an appeal with the Carroll County Superior Court.

Discussion

As noted above, the Gordons' and Caytens' appeals were consolidated in this court for the purpose of a determination on summary judgment only. The appellants move for summary judgment on Counts I and II of their appeal. First the appellants contend that the Wetlands Council erred as a matter of law by failing to make specific findings of fact and rulings of law in its denial of the appellants' appeals and their motions for reconsideration, contrary to RSA 482-A:10, VI. Second, the appellants argue that the Wetlands Council and the Bureau failed to assume jurisdiction over upland areas contrary to RSA 483-B, the "Comprehensive Shoreline Protection Act". The appellees object and filed cross motions for summary judgment on the same counts.

I. Findings of Fact and Rulings of Law

RSA 482-A:10 grants a statutory right of appeal from decisions by the Wetlands Bureau to the Wetlands Council ("Wetlands Council" "Council") and the Superior Court. RSA 482-A:10 V provides that on appeal the Council shall hold a non-evidentiary hearing. It specifically states that the appeal to the Council is determined on the record below and that all findings of the department upon all questions of fact are *prima facie* lawful and reasonable. In issuing a decision on an appeal,

the council may affirm the decision of the department or may remand to the department with a determination that the decision complained of was unlawful or

unreasonable. The council shall specify the factual and legal basis for its determination and shall identify the evidence in the record that supports its decision.

RSA 482-A:10, VI (2001) (emphasis supplied). The appellants argue that the plain meaning of the statute requires the council to provide detailed findings and rulings in every appeal before the council. The appellees contend that the statute requires the council to make specific findings and rulings only when granting an appeal. The court agrees with the appellees.

In matters of statutory interpretation, the court first examines "the language of the statute itself, and, if possible, construe[s] the language according to its plain and ordinary meaning." Hutchins v. Peabody, 151 N.H. 82, 84 (2004). "Where the language of a statute is clear on its face, its meaning is not subject to modification." *Id.* This is not a cryptic statutory provision. The court need not look any further than the face of the statute to determine the meaning. The use of the conjunction "or" between "may affirm" and "may remand" acts to separate those two actions. "May remand" is followed by the phrase "with a determination". The court interprets this statute to mean that when the Council remands to the Bureau, it is required to make a determination with findings and rulings. However if the Council simply affirms the Bureau's decision then no findings and rulings are required.

The appellants argue that the purpose of findings and rulings is to provide sufficient information to enable "meaningful review" by a higher court. Appeal of Psychiatric Institutes of America, 132 N.H. 177 (1989). In the instant case, the Council found and ruled that the appellants had failed to demonstrate, based on the issues and arguments raised on review and the certified record, that the Bureau acted unreasonably or unlawfully. Even though not required by statute to issue findings and rulings, there were sufficient findings and rulings issued by the Bureau to allow meaningful review by the Council and ultimately by this court. Accordingly, the court finds that the appellants have failed to meet its burden of proving that they are entitled to judg-

ment as a matter of law. The appellants' motion for summary judgment on Count I is DENIED.

The appellees motion for summary judgment on Count I is GRANTED.

II. Shoreland Protection Act

The appellants argue that the Bureau and the Wetlands Council have failed to fully exercise jurisdiction with regard to the Comprehensive Shoreland Protection Act, RSA 483-B. In particular they contend that the Bureau failed to exercise jurisdiction over upland areas during the permitting process. The appellees argue that the Bureau does not have an obligation to apply its standards under the CSPA to upland areas; it is only responsible for the lakebed and lake bank and has no authority to extend its jurisdiction to upland areas.

In this instance the court must look at the interrelation of RSA 483-B and RSA 482-A. The court "interpret[s] statutes in the context of the overall statutory scheme and not in isolation." The Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 150 N.H. 804, 806 (2004). "By so doing, [the court is] better able to discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id.

RSA 483-B was adopted in 1991 for the purpose of protecting New Hampshire's shorelands. In particular, under the act, the legislature expressed that the state has "jurisdiction to control the use of the public waters and adjacent shoreland for the greatest public benefit." RSA 483-B:1, II. The need to protect the development of shoreland property stemmed from the effect shorelands have on the state's waters. RSA 483-B:1, III. The legislature observed that "the potential exists for uncoordinated, unplanned and piecemeal development along the state's shorelines, which could result in significant negative impacts" on the state's waters. RSA 483-B:1, III (2001). It was for these purposes that the CSPA was adopted.

The legislature created certain minimum standards for the development and use of shore-lands of the state's public waters. These standards serve several purposes, in particular to: protect freshwater wetlands; control land uses; conserve shoreline cover and access points to inland waters; preserve the state's lakes in their natural state; promote wildlife habitat; protect the public's use of waters; and to conserve natural beauty and open spaces. RSA 483-B:2 (2001). Because the development of the state's shore lands can be regulated by many different entities, the legislature required consistency with the CSPA. RSA 483-B:3 requires state agencies to "perform their responsibilities in a manner consistent with the intent of [the CSPA]." When a state agency or a local permitting entity issues work permits within the protected area, those permits "shall be issued only when consistent with the policies of [the CSPA]." RSA 483-B:3 (I) (2001).

Any person intending to build a water dependent structure, which includes boathouses, or intending **to alter the bank** of a water body, "shall obtain approval and all necessary permits pursuant to RSA 482-A." RSA 483-B:6 I. (b) (Supp. 2004) (emphasis supplied). See RSA 482-A:3. RSA 482-A:21 prohibits the excavation and dredging of lake beds and banks below the high water mark without a permit. It specifically states that the subdivision does not apply to land above the natural mean high water mark. A permit is required for the excavation, dredging and construction in or on any bank and adjacent to any waters of the state. RSA 482-A:3. The appellees argue that this is the limit of the Bureau's jurisdiction – the bank of the water. Interestingly, both the Dahl permit and the Cambi permit explicitly include permission to excavate the bank above the high water mark.

The legislature understood, in adopting the CSPA that the statute might conflict with pre-existing statutes. To that end, the legislature included the "Consistency Required" provision of the CSPA, which states in pertinent part: "[w]hen the standards and practices established in this

chapter conflict with other local or state laws or rules, **the more stringent standard shall control.**" RSA 483-B:3 II (2001) (emphasis supplied).

In both the Gordon and Dahl case, the Bureau was asked to grant a permit for the dredging and excavation, not only of the lake bed and shore, but of a considerable portion of the banking, resulting in a permanently altered bank. The CSPA specifically includes boathouses and bank alterations in its purview. It also requires all state agencies to comply with the act.

To suggest, as the State does on this appeal, that the jurisdiction of a branch of the Department of Environmental Services does not extend to the upland areas of an extensive lakebed and lakeshore project is contrary to a plain reading of the statutory scheme. Furthermore, the fact that the Bureau included the square footage to be excavated above the high water mark in its permits suggests to the court that the Bureau considered that area to be within their jurisdiction; otherwise they would be unable to grant a permit for dredging beyond the high water mark. Having granted the permit, the Bureau cannot then disavow itself of the requirements of the CSPA.

Based on a plain reading of the statutory scheme, applying the policies behind the adoption of the CSPA and the interplay between RSA 483-B and RSA 482-A, the court finds that in the present cases, the Bureau's jurisdiction extended to the entire area of the proposed projects, it did not end at the bank of the lake.

However, the court's analysis does not end there. The appellants argue that by extending jurisdiction to the upland areas of the project, the Bureau is required to apply the strict standards of the wetlands regulations to the upland areas. The court agrees. Considering the statutory scheme in its entirety, the court finds that the consistency requirement, discussed *supra* applies in this instance. The CSPA outlines minimum standards that are to be applied to projects within the protected area. RSA 483-B:9. Specific to this case is RSA 493-B:9, I (c) which states: "A water

dependent structure, meaning one which is a dock, wharf, pier, breakwater or other similar structure, or any part thereof, built over, on, or in the waters of the state shall be constructed only as approved by the department, pursuant to RSA 482-A.” The CSPA explicitly requires approval by the Bureau under the standards of RSA 482-A. Even if it did not, where the standards of the CSPA is in “conflict with other...state laws and rules, the more stringent standard applies.” In this case, the standards under the wetlands regulations are more stringent than the standards laid out in the CSPA.

Accordingly, the court finds that the Bureau and the Council are required as a matter of law to apply the standards laid out in the wetlands permitting regulations, to the upland areas indicated in the plans for the Dahl and Cambi properties. Because the appellants have demonstrated that they are entitled to judgment as a matter of law, their motions for summary judgment on their second count are GRANTED. The appellees’ motions for summary judgment are DENIED.

Appellee Cambi Squam Lake Realty Trust argued that the Wetlands’ Council was an improper venue for the appellants’ appeal under the CSPA and that the Water Council is the appropriate appellate body. The court disagrees. Because the court has determined that the Wetlands Bureau has jurisdiction with regard to land within the CSPA protected area when issuing a permit under RSA 482-A that implicates upland areas, the Wetlands Council is the appropriate venue to address appeals. Appellee Cambi Squam Lake Realty Trust’s motion for summary judgment on the issue of venue is DENIED.

CONCLUSION

The Gordons and the Caytens, and the intervenor Conservation Law Foundation have met their burden of proving that they are entitled to judgment as a matter of law on the issue of the

jurisdiction of the Wetlands Bureau over areas within the Comprehensive Shoreland Protection Act and lying outside of the traditional bounds of jurisdiction. The Department of Environmental Services, Wetlands Council and the intervenors the Dahls and the Cambi Squam Lake Realty Trust have met their burden of proving that they are entitled to judgment as a matter of law on the issue of required findings and rulings by the Wetlands Council. The Cambi Squam Lake Realty Trust has not met its burden of proving as a matter of law that the Water Council is the proper venue for appeals under the Comprehensive Shoreland Protection Act. Accordingly, the motions for summary judgment are GRANTED in part and DENIED in part as set forth herein.

Carroll County Docket # 04-E-0083 is to be transferred back to Carroll County for disposition consistent with this order.

So ORDERED.

Date: 8/12/05

H. W.
HAROLD W. PERKINS
PRESIDING JUSTICE